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IN THE

Supreme Court of the United States

October Term, 1941

No. 1011

LUIGI SCHIAFFINO, PAOLO CALTAFIANO, LORENSO BARZELATTO, CESARE DI MAZZO, CARLO EMANUELE GALLINO, FRANCESCO SCIANCALEPORE, GIUSEPPE ZIZZO, LORENZO SALVATORE MAFFEI, SERGIO MINERVINE, ANGELO ARMENIA, ARMANDO MORFI, DANIELE SORRENTINO, UMBERTO SARBIA, PASQUALE DE GREGORIO, CONSTANTINO CABOARA and GIUSEPPE ABRAZZO,
Petitioners,

AGAINST

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

HOMER L. LOOMIS,
CHARLES RUZICKA,
Counsel for Petitioners.

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IN THE

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No.....

LUIGI SCHIAFFINO, PAOLO CALTAFIANO, LORENSO BARZELATTO, CESARE DI MAZZO, CARLO EMANUELE GALLINO, FRANCESCO SCIANCALEPORE, GIUSEPPE ZIZZO, LORENZO SALVATORE MAFFEI, SERGIO MINERVINE, ANGELO ARMENIA, ARMANDO MORFI, DANIELE SORRENTINO, UMBERTO SARBIA, PASQUALE DE GREGORIO, CONSTANTINO CABOARA and GIUSEPPE ABRAZZO,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

The petition of Luigi Schiaffino, Paolo Caltafiano, Lorenso Barzelatto, Cesare Di Mazzo, Carlo Emanuele Gallino, Francesco Sciancalepore, Giuseppe Zizzo, Lorenzo Salvatore Maffei, Sergio Minervine, Angelo Armenia, Armando Morfi, Daniele Sorrentino, Umberto Sarbia, Pasquale De Gregorio, Constantino Caboara and Giuseppe Abrazzo respectfully alleges and propounds as follows:

A.

Summary Statement of Matter Involved.

1.

Your petitioners are mariners, to wit, respectively, the master, the chief engineer, two second engineers and sea-

men of the steamship Pietro Campanella, who were,—until seized, removed from their vessel and confined, as hereinafter narrated,—attached to and living aboard that vessel, with the other members of her crew in the port of Baltimore, Maryland; the said steamer Pietro Campanella then being of Italian register, flying the Italian flag and being laid up at dead anchorage in said port for the duration of the war between Italy and Great Britain.

As stipulated herein, the Pietro Campanella had, by "the Port Authorities and Captain of the Port of Baltimore," been "placed at dead anchorage," "so as to immobilize the ship for an indefinite period," "in a place where she would not or could not interfere with the navigation of ships in the port of Baltimore" (Pr. Rec., p. 8).*

And, as also stipulated, the said steamer "was not engaged in foreign commerce from October 1, 1940, to March 30, 1941" (*id.*).

2.

Your petitioners were indicted, tried and convicted, after trial by jury, in the United States District Court for the District of Maryland on the charge of *tampering* with the motive power and navigational appliances of their said steamer while she was at dead anchorage as aforesaid in the said port of Baltimore in the month, and prior to the 30th, of March, 1941, and your petitioners have been sentenced to imprisonment in a federal penitentiary for terms of three years in the case of Luigi Schiaffino, the Master, two years in the case of Paolo Caltafiano, Chief Engineer, and one year and one day in the case of all the other petitioners, save Carlo Emanuele Gallino, who was sentenced to be imprisoned in jail for three months.

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*This and similar notations refer to the pages of the printed record filed herein.

3.

The proofs showed that your petitioners, in doing what they did, were acting pursuant to the orders both of the owner of the vessel and the Italian naval authorities; failed to show that they were acting for any purpose other than to place their vessel in such a condition that, if she should fall into the hands of their country's enemy, she could not be beneficially used by that enemy for a long time to come and, then, only after the execution of extensive repairs at great expense; and failed to show that your petitioners knew of, or intended to violate, any law of the United States prohibiting their doing what they respectively did.

The proofs further show that, shortly following the dismantling of the said machinery in the engine room of their said steamer, your petitioners were forcibly removed from their steamer by United States Coast Guard officers on or about the thirtieth day of March, 1941, and have been kept in confinement ever since.

4.

Your petitioners appealed from the said judgments of conviction and imprisonment to the United States Circuit Court of Appeals for the Fourth Circuit, which, however, on December 26, 1941, entered a judgment affirming the judgments entered below, and on January 31, 1942, denied your petitioners' timely application for a rehearing.

5.

Petitioners feel aggrieved and complain of the proceedings had below for the following reasons:

a.

The application to the petitioners of Title 3 of the Act of June 15, 1917, c. 30, 40 Stat. 221 (18 U. S. C. A., sec. 502), though what they did was done:

(1) With the consent and approval, and at the intance, of the owner of their vessel;

(2) Without involving any trespass on or wrong to, the person or property of another;

(3) To the machinery of a laid-up ship not engaged in foreign commerce;

(4) Without any criminal intent; and

(5) Without any intent to imperil or undermine the safety of their steamer.

(Assignments of Error, 3rd, cert. typ. tr. rec., 532; 4th, 532; 5th, 533; 6th, 534; 7th, 535; 9th, 538; 12th, 540; 13th, 541; 15th, 542; 16th, 542; 18th, 543; 19th, 544; 20th, 545; 21st, 546; 22nd, 547; 25th, 548; 26th, 549; 27th, 549; 28th, 550; 29th, 550; 30th, 551; 31st, 551; 32nd, 551).*

b.

The failure of the Circuit Court of Appeals to hold that the petitioners' demurrer to the indictment, as charging no crime punishable under the laws of the United States, should have been sustained and the judgments reversed because:

(1) The indictment failed to allege the possessor-ownership of the vessel to be in someone other than the petitioners or those at whose instance they acted;

(2) The indictment failed to allege that the vessels were engaged in foreign commerce; and

(3) The indictment depended for its validity upon a construction of the statute, that, if permissible, rendered the statute unconstitutional.

(Assignments of Error, 1st, cert. typ. tr. rec., 532; 4th, 532; 30th, 551; 32nd, 551).

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*These and similar notations refer to pages of the certified typewritten transcript of record filed herewith.

c.

The failure of the Circuit Court of Appeals to hold that the trial judge should have directed a verdict of "not guilty" on the evidence, as being insufficient to warrant a verdict against these petitioners, and to reverse the judgment below accordingly because:

(1) The proofs did not reasonably tend to show that the acts complained of involved a trespass by petitioners upon the property of others or were done without the owner's cognizance, consent and approval;

(2) The proofs showed the vessel not to have been engaged in foreign commerce;

(3) The proofs did not reasonably tend to show the acts complained of to have been accompanied by any malice or criminal intent as charged in the indictment; and

(4) The proofs did not reasonably tend to show that the acts complained of were done with an intent to injure or endanger the *safety* of the vessel within the language of the statute.

(Assignments of Error, 4th, cert. typ. tr. rec., 532; 19th, 544; 20th, 545; 27th, 549; 28th, 550; 31st, 551).

d.

The denial of petitioners' right to have the jury instructed

(1) That the statute had no application to the petitioners' acts, if those acts were done with the cognizance, consent and approval of the owner of the Pietro Campanella;

(2) That the statute had no application to the petitioners' acts, unless the vessel was engaged in foreign commerce;

(3) That before the petitioners could be found guilty the jury were required to be satisfied beyond

a reasonable doubt that, in doing what they did, they were acting with a purpose to commit a wrong against some other person or his property or knew of the statute and intended to violate it.

(Assignments of Error, 5th, cert. typ. tr. rec., 533; 6th, 534; 7th, 535; 9th, 538; 12th, 540; 13th, 541; 15th, 542; 16th, 542; 18th, 543; 19th, 544; 20th, 545; 21st, 546; 22nd, 547; 25th, 548; 26th, 549; 27th, 549; 28th, 550; 29th, 550; 30th, 551).

e.

The denial of the petitioners' right to have the judgment of the trial court arrested pursuant to the motion therefor seasonably made by the petitioners for errors committed as hereinbefore noted.

(Assignment of Error, 32nd, cert. typ. tr. rec., 551).

B.

Reasons Relied on for Allowance of Writ.

The reasons relied on by your petitioners for an allowance of the writ herein prayed for are that the Circuit Court of Appeals for the Fourth Circuit has:

1. Rendered a decision in conflict with the Fifth Amendment to the Constitution of the United States and the general current of authority in other Anglo-Saxon jurisdictions.

2. Because the Circuit Court of Appeals has decided important questions of general law in a way untenable and in conflict with the general current of authority.

3. Because the Circuit Court of Appeals has decided important questions of federal law that have not been but should be settled by this Court.

4. Because the Circuit Court of Appeals has decided federal questions in a way that conflicts with the Fifth amendment to the Constitution of the United States, the applicable decisions of this Court and the judicial history of federal statutes *in pari materia.*

5. And because the Circuit Court of Appeals has so far departed from the accepted and usual course of ju-

dicial proceedings, and has so far sanctioned such a departure by the United States District Court for the District of Maryland, as to call for the exercise of this Court's power of supervision.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the decision of the United States Circuit Court of Appeals for the Fourth Circuit should be granted.

LUIGI SCHIAFFINO,

PAOLO CALTAFIANO,

LORENSO BARZELATTO,

CESARE DI MAZZO,

CARLO EMANUELE GALLINO,

FRANCESCO SCIANCALEPORE,

GIUSEPPE ZIZZO,

LORENZO SALVATORE MAFFEI,

SERGIO MINERVINE,

ANGELO ARMENIA,

ARMANDO MORFI,

DANIELE SORRENTINO,

UMBERTO SARBIA,

PASQUALE DE GREGORIO,

CONSTANTINO CABOARA,

GIUSEPPE ABRAZZO.

State of Maryland,
City of Baltimore—ss.:

Luigi Schiaffino, Paolo Caltafiano, Lorenso Barzelatto, Cesare Di Mazzo, Carlo Emanuele Gallino, Francesco Sciancalepore, Giuseppe Zizzo, Lorenzo Salvatore Maffei, Sergio Minervine, Angelo Armenia, Armando Morfi, Daniele Sorrentino, Umberto Sarbia, Pasquale De Gregorio, Constantino Caboara, Giuseppe Abrazzo, being duly sworn, depose and say respectively that they are familiar with the contents of the foregoing petition and that the same is true to the best of their knowledge, information and belief.

LUIGI SCHIAFFINO,
PAOLO CALTAFIANO,
LORENSO BARZELATTO,
CESARE DI MAZZO,
CARLO EMANUELE GALLINO,
FRANCESCO SCIANCALEPORE,
GIUSEPPE ZIZZO,
LORENZO SALVATORE MAFFEI,
SERGIO MINERVINE,
ANGELO ARMENIA,
ARMANDO MORFI,
DANIELE SORRENTINO,
UMBERTO SARBIA,
PASQUALE DE GREGORIO,
CONSTANTINO CABOARA,
GIUSEPPE ABRAZZO.

Subscribed and sworn to
before me this 4th day of March, 1942.

E. Allen Schilpp,
Notary Public,
Baltimore, Maryland.

I certify that I have read the foregoing petition and that it sets forth in my opinion a proper case for the granting of a writ of certiorari and is not filed for purpose of delay.

HOMER L. LOOMIS,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

October Term, 1941

No.....

LUIGI SCHIAFFINO, PAOLO CALTAFIANO, LORENSO BARZELATTO, CESARE DI MAZZO, CARLO EMANUELE GALLINO, FRANCESCO SCIANCALEPORE, GIUSEPPE ZIZZO, LORENZO SALVATORE MAFFEI, SERGIO MINERVINE, ANGELO ARMENIA, ARMANDO MORFI, DANIELE SORRENTINO, UMBERTO SARBIA, PASQUALE DE GREGORIO, CONSTANTINO CABOARA and GIUSEPPE ABRAZZO,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

A.

Introductory Statements.

1.

Report of Opinion Below.

The opinion of the Circuit Court of Appeals is reported in 124 F. (2d) 310. No opinion was rendered by it in denying the petition for a rehearing. And no opinion was rendered by the District Court.

2.

Jurisdiction.

The judgment of the Circuit Court of Appeals denying the petition for a rehearing was entered on the 31st day of January, 1942.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended in the Act of February 13th, 1925, (43 Stat. 938; 28 U. S. C. A., sec. 347).

3.

Specifications of Error.

The specifications of error are set out in the Petition supra (3-5).

B.

Argument.

In view of the substantial identity of the facts and issues herein with those in *Bersia et al.* v. *United States*, argued herewith, we would respectfully ask the Court to consider the written argument filed in support of the petition for certiorari therein to have been repeated herein and to accord it the same force and effect in disposing of this petition as it would have received if here set out in *extenso*.

The writ of certiorari prayed for should be granted to the end that this Court may review and reverse the judgments entered below.

Respectfully submitted,

HOMER L. LOOMIS,
CHARLES RUZICKA,
Counsel for Petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1009

ADRIANO MERLANO BERSIA, CARLO NOVELLA, ERNESTO VIANI, GIUSEPPE PRATALONGO, GIUSEPPE CARTA, ERNESTO BENEDETTI, SEVERINO ENRICO ALIAS ENRICO SEVERINO, PLACIDO FRISONE, GIUSEPPE SICCARDI AND ANGELO NAPOLI, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 1010

PAOLO PIERACCINI, CARLO SAGLIETTO, ALBERTO ZAPPALA, MARIO GARAU, ALCIDO ROSSI, NUNZIATO SCAMARDELLA, NUNZIO DAMIANO, GIROLAMO MESSINA, GIUSEPPE PUGLISI, ROCCO PALUMBO, GIUSEPPE IADICOLA, GAETANO TARATINO, LORENZO TRAVERSO, ALFIO FRESTA AND GIO BATTA SEGRETI, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 1011

LUIGI SCHIAFFINO, PAOLO CALTAFIANO, LORENZO BARZELATTO, CESARE LI MAZZO, CARLO EMANUELE GALLINO, FRANCESCO SCIANCALEPORE, GIUSEPPE

ZIZZO, LORENZO SALVATORE MAFFEI, SERGIO MINERVINE, ANGELO ARMENIA, ARMANDO MORFI, DANIELE SORRENTINO, UMBERTO SARBIA, PASQUALE DE GREGORIO, CONSTANTINO CABOARA AND GIUSEPPE ABRAZZO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 100–105) is reported in 124 F. (2d) 310.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered December 26, 1941 (R. 105–106; Pieraccini R. 142–143; Schiaffino R. 150–151),[1] and petitions for rehearing were denied January 31, 1942 (R. 107; Pieraccini R. 144; Schiaffino R. 152). The petitions for writs of certiorari were filed March 4, 1942. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

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[1] The letter "R." is used to designate the record in the *Bersia* case, No. 1009. References to the records in the *Pieraccini* and *Schiaffino* cases, Nos. 1010 and 1011, are specifically noted.

QUESTIONS PRESENTED

I. Whether the destruction, by officers and crew, of the motive power and instrumentalities of navigation of a merchant vessel of foreign registry while the vessel is tied up in a port of the United States falls within the interdiction of section 1 of Title III of the Act of June 15, 1917,[2] 40 Stat. 217, 221. This question raises, in turn, the following subsidiary questions:

A. Whether Title III applies to such acts of destruction when committed at the direction of the foreign owner of the vessel.

B. Whether, in view of the prohibition contained in section 3 of Title II of the Act of June 15, 1917 (against wilful destruction or injury of any private vessel, foreign or domestic, by the owner, officers, or crew), Title III applies to acts of destruction of the motive power and instrumentalities of navigation of a merchant vessel of foreign registry committed by the officers and crew of such a vessel.

C. Whether Title III applies to a merchant vessel of foreign registry lying in a port of the United States but not actually engaged in foreign commerce at the time of the commission of the acts denounced by Title III.

D. Whether malice against the owner of the vessel is an essential ingredient of the offense defined in Title III.

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[2] Since Title III contains only one section, its provisions will hereinafter be referred to only by the title number.

E. Whether petitioners were improperly convicted on the theory that Title III denounces acts committed with intent to injure the vessel independently of intent to endanger the safety of the vessel.

II. Whether Title III violates the Fifth Amendment because, in so far as the title applies to owners of vessels and their agents, it unjustifiably infringes property rights, or because of indefiniteness.

STATUTE INVOLVED

Title III of the Act of June 15, 1917, c. 30, 40 Stat. 217, 221 (U. S. C., title 18, sec. 502), provides:

> SECTION 1. Whoever shall set fire to any vessel of foreign registry, or any vessel of American registry entitled to engage in commerce with foreign nations, or to any vessel of the United States as defined in section 501 of this title, or to the cargo of the same, or shall tamper with the motive power or instrumentalities of navigation of such vessel, or shall place bombs or explosives in or upon such vessel, or shall do any other act to or upon such vessel while within the jurisdiction of the United States, or, if such vessel is of American registry, while she is on the high sea, with intent to injure or endanger the safety of the vessel or of her cargo, or of persons on board, whether the injury or danger is so intended to take place within the jurisdiction of the United States, or after the vessel shall have departed therefrom; or whoever shall at-

tempt or conspire to do any such acts with such intent, shall be fined not more than $10,000, or imprisoned not more than twenty years, or both. The term "United States", as used in this section, includes the Canal Zone and all territory and waters, continental or insular, subject to the jurisdiction of the United States.[3]

STATEMENT[4]

Petitioners, who were officers and members of the crews of three merchant vessels of Italian registry, the *Villarperosa, Euro,* and *Pietro Campanella,* were indicted under Title III of the Act of June 15, 1917 (*supra,* pages 4–5), for tampering with the motive power and instrumentalities of navigation of the vessels while they were within the jurisdiction of the United States, with intent to injure and endanger the safety of the vessels (R. 1–2).[5] The relevant facts, appearing from the

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[3] Title II of the Act of June 15, 1917, 40 Stat. 217, 220, as amended by section 3 of the Act of March 28, 1940, 54 Stat. 79 (U. S. C., title 50, secs. 191–194), which petitioners contend is material in interpreting Title III, is set forth in the Appendix, *infra,* pp. 20–22.

[4] Since the facts of the present cases are substantially similar, a single statement will suffice for all. The circumstances of the *Bersia* case as set out below may be taken, with the exception of the names of petitioners and names and locations of the vessels, as applying to the *Pieraccini* and *Schiaffino* cases, unless otherwise indicated.

[5] Petitioners in No. 1009 were indicted in the Eastern District of North Carolina (R. 1), and petitioners in Nos. 1010 and 1011 in the District of Maryland (Pieraccini R. 1; Schiaffino R. 1).

evidence given at the trial, may be summarized as follows:

Petitioner Bersia, master of the *Villarperosa,* was instructed by the manager of the corporate owner of that vessel before leaving Genoa that should hostilities break out between Italy and another country during the voyage he was to proceed to the nearest neutral port, put himself and his ship at the disposal of the Italian authorities, and follow all orders given him through the local Italian Embassy (R. 32–33). On February 19, 1941, while the *Villarperosa* was anchored in the port of Wilmington, North Carolina,[6] the Assistant Naval Attaché of the Italian Embassy in Washington advised Bersia that he was to destroy the motive power of his vessel upon receiving a code telegram (R. 33). Bersia received such a telegram on March 20, 1941, and immediately ordered his chief engineer, petitioner Novella, to destroy the motors of the ship (R. 33–34). Novella, assisted by the other petitioners, proceeded to carry out the order (R. 34, 37–39).

Bersia testified that he ordered the motors destroyed in order to save "the ship from falling in the hands of enemies" of his country and that he had no intention "to injure or endanger its safety" (R. 34). Each of the other petitioners admitted

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[6] The *Villarperosa* had arrived at Wilmington on June 4, 1940 (R. 32), and remained there after the beginning of war between Italy and Great Britain on June 10, 1940 (R. 33).

his participation, and stated that he acted solely upon the orders of his superior and that he did nothing to endanger the safety of the ship (R. 38–39).

While these events occurred the *Villarperosa* was anchored across the Cape Fear River from the Custom House at Wilmington (R. 8). On March 21, 1941, the Captain of the Port, apparently suspecting that the ship would be or had already been disabled, ordered that it be moved to a safer mooring about two miles up the Cape Fear River where it would be less likely to break loose and become a danger to the harbor (R. 8, 9). A tug boat captain who was retained by Bersia to move the *Villarperosa* refused to assume this responsibility because the ship had no motive power (R. 10, 29, 34–35). He testified that for this reason it was dangerous to the safety of the vessel to attempt to move it through a drawbridge on the route (R. 30). Finally, after an officer of the Coast Guard agreed to assume responsibility, the ship was moved upstream (R. 30, 35).

In the *Pieraccini* case, witnesses for the Government testified that the main engine, radio equipment, regular and auxiliary steering equipment, much of the fire equipment, the cargo winches, and the two main boilers of the *Euro,* which was anchored at the time in the port of Baltimore, had been badly damaged and were out of commission (Pieraccini R. 11–16, 24); the

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vessel therefore had inadequate fire protection (*id.* 12, 15–16), the steering apparatus was inadequate even for being towed (*id.* 19, 31), and the safety of the vessel was endangered by virtue of its inability to move under its own power in the event of a storm or other emergency (*id.* 31); because of the destruction of the impeller housing, there was danger of sinking if a single valve failed or was opened (*id.* 13–14, 18, 21, 32). The petitioners did not deny the nature and extent of the damage inflicted.

An inspector of the United States Bureau of Marine Inspection and Navigation testified, in answer to a hypothetical question detailing the items of damage inflicted upon the ship, that in his opinion it was unsafe (*id.* 41–44, 47–48). This was likewise the opinion of Lieutenant Capron of the United States Coast Guard (*id.* 17–18) and of Special Agent Champlin of the Federal Bureau of Investigation (*id.* 31–32), both of whom went aboard the vessel shortly after it was damaged (*id.* 10, 26). Petitioners' witnesses testified that the safety of the vessel was not endangered for the purpose of its remaining completely immobilized (*id.* 77, 103–104).

There was similar testimony in the *Schiaffino* case (Schiaffino R. 19, 21–22, 24–26, 48–49; 102–103, 104–105, 108–109).

Petitioners in all three cases were convicted, and were sentenced to imprisonment for terms vary-

ing from three months to three years (R. 86–95; Pieraccini R. 130–134; Schiaffino R. 137–142). The convictions were affirmed by the Circuit Court of Appeals (R. 105–106; Pieraccini R. 142–143; Schiaffino R. 150–151).

ARGUMENT

I

Petitioners' principal contention is that the acts of destruction which they committed were not within the scope of Title III of the Act of June 15, 1917. The subsidiary propositions upon which this contention is grounded will be considered *seriatim*.

A. Petitioners argue (Pet. 13–41)[7] that at common law defendants similarly situated would not have been guilty of analagous offenses (*e. g.*, malicious destruction of property, arson), that criminal statutes are to be construed in the light of the common law, and that, therefore, owners and their agents are impliedly excepted from the operation of Title III since they are not explicitly included within its terms. This reasoning might well be sound in the construction of a statutory

[7] References to the contentions advanced by petitioners are to the brief in support of the petition for certiorari in the *Bersia* case, No. 1009. The petitions in all three cases raise the same questions, and supporting argument is set forth only in the brief in the *Bersia* case (see Pieraccini Pet. 11; Schiaffino Pet. 11).

offense truly analagous to common-law crimes. Cf. section 285 of the Criminal Code (U. S. C., title 18, sec. 464), *United States* v. *Cardish*, 145 Fed. 242 (E. D. Wis.). But it is obviously inapplicable in the case of a statute having a new and special purpose.

Title III was not designed to protect the owners of vessels against the acts of trespassers, but to protect and foster the public interest in foreign commerce and the instrumentalities by which it is carried on. *Marchese* v. *United States*, decided March 9, 1942 (C. C. A. 5).[8] This is evidenced by the character of the act of which it is a part.[9] Contemporaneous events which prompted enactment of the statute and the act's legislative history make its purpose clear. Cf. *Church of the Holy Trinity* v. *United States*, 143 U. S. 457, 463; *United States* v. *Union Pacific R. R.*, 91 U. S. 72, 79. The provisions of Title III were occasioned by the German practice early in 1917 of damaging and scuttling German merchant vessels in Ameri-

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[8] The opinion in the *Marchese* case is set forth in the Appendix, *infra*, pp. 22–31.

[9] The Act of June 15, 1917, is entitled "*An Act* to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes." C. 30, 40 Stat. 217; see H. Rep. No. 30, p. 1; H. Rep. No. 69, p. 1; S. Doc. No. 37, p. 1; S. Doc. No. 44, p. 1 (65th Congress, 1st session). Title III bears the caption "Injuring Vessels Engaged in Foreign Commerce." 40 Stat. 221.

can waters.[10] These were not the acts of trespassers against whom the owners of vessels had inadequate redress, but were the deliberate acts of the officers and crews of the incapacitated ships, done at the direction of their owners and government. See *Wierse* v. *United States,* 252 Fed. 435, 441 (C. C. A. 4). The instances were well known to Congress at the time. Representative Walsh, of the House of Representatives Judiciary Committee, stated in debate on the Espionage bill, which became the act of June 15, 1917:

> * * * To conclude, with the exception of the section that I have criticized [in Title I], I submit there is a real need for this legislation, and that without it the various departments of the Government will be powerless to cope with certain situations that have been and are confronting us. For instance, we were told that some of the ships which were tied up in our harbors were used as places wherein plots were being hatched against the Governments with which this Nation was at peace; that some of those ships were crippled because of their machinery being tampered with and destroyed; * * *. [55 Cong. Rec. 1604.]

Speaking later of the provision against "injuring vessels" (Title III, 40 Stat. 221), Representa-

[10] See New York Times February 1, 1917, page 1, column 1; February 2, 1917, page 4, column 1; February 7, 1917, page 4, columns 2, 3, and page 5, column 5; February 8, 1917, page 2, column 4; April 6, 1917, page 1, column 1.

tive Graham, another member of the Judiciary Committee, remarked:

> Anyone can understand why a provision of that kind is necessary. We have had object lessons to teach us. [55 Cong. Rec. 1720.]

The conjunction of the circumstances of the damaging of the German ships with the legislation which became the Espionage Act compels the conclusion that just such acts as petitioners committed were intended to be prohibited by the statute. It is obvious, therefore, that Congress intended the inclusive word "whoever", employed in Title III, to have its ordinary connotation of "everyone". *Marchese* v. *United States,* Appendix, *infra,* pp. 22, 29; *United States* v. *Tomicich,* 41 F. Supp. 33, 35 (E. D. Pa.).[11]

B. Petitioners also assert (Pet. 50–56) that since section 3 of Title II of the Act of June 15, 1917, c. 30, 40 Stat. 217, 220 (U. S. C., title 50, sec. 193), denounces wilful destruction or injury to vessels by their owners, officers, or crews, it creates an exception to the scope of the application of Title III, which applies in terms to everyone, and that, therefore, the latter provision must be interpreted

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[11] Petitioners' related arguments that use of the word "tamper" in the statute indicates that Title III was not intended to apply to owners or those acting under their orders (Pet. 43–49) and that the indictment was insufficient for failure "to lay the property in anyone" (Pet. 98–99) are also without merit for the reasons just stated.

as applying only to trespassers.[12] This argument ignores the fact that the provision against wilful destruction or injury contained in section 3 of Title II is not limited in its application to owners, masters, and crews, but applies as well to any "other person". The provision is not, therefore, legislation dealing specially and, by implication, exclusively with a particular class of persons, but has as wide an application with respect to defendants as Title III.

It is manifest that the important differences between the two provisions are with respect to type of vessel affected and place of the acts done.[13] Section 3 of Title II prohibits wilful "destruction or injury" of "any private vessel, foreign or domestic, * * * within the territorial waters of the United States". Title III, on the other hand, interdicts acts intended "to injure or endanger the safety" of "any vessel of foreign registry, or any vessel of American registry entitled to

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[12] This contention is predicated in part (see Pet. 51–53) upon the fact that section 3 of Title II, as originally enacted, authorized imprisonment for not more than two years (40 Stat. 220), while Title III authorizes a maximum imprisonment of twenty years (40 Stat. 221). It should be noted, however, that section 3 of Title II was amended by section 3 (b) of the Act of March 28, 1940, c. 72, 54 Stat. 79 (U. S. C., title 50, sec. 193), to provide for maximum imprisonment of ten years. The heaviest sentence imposed on any of the petitioners was three years' imprisonment (*supra*, pp. 8–9).

[13] Title III also expressly prohibits attempts and conspiracies to commit the acts principally prohibited.

engage in commerce with foreign nations," when the acts are done within the jurisdiction of the United States or, in the case of American vessels, on the high seas; the offense is complete regardless of where the injury or dangerous condition is intended to become effective. While section 3 of Title II is framed to protect shipping and waterways within American jurisdiction, the design of Title III to protect foreign commerce specifically is readily discernible.

It is not material that there may be some overlapping in the scope of the two provisions and that particular acts may be forbidden by both section 3 of Title II and by Title III; clearly, criminal statutes need not be mutually exclusive in operation, and the existence of section 3 of Title II presents no reason for implying an exception from Title III with respect to persons situated as were petitioners.

C. Petitioners contend (Pet. 56–70) that Title III applies only to acts affecting ships actually engaged in foreign commerce at the time the prohibited acts are committed. However, the terms of the statute negate this contention. Title III covers any vessel of foreign registry or any vessel of American registry entitled to engage in foreign commerce. The two classes of ships specified in the statute are the classes which engage in foreign commerce of the United States and it should not be supposed that Congress intended to leave

such ships unprotected by Title III up to the point at which they become actively engaged in transportation. The background of the statute also strongly contradicts petitioners' position on the present point: the German merchant vessels sabotaged in 1917 were vessels that had been laid up in American ports and were not at the time engaged in foreign commerce.[14] See note 10, page 11, *supra*.

Petitioners stress (Pet. 62–65) the title of Title III—"Injuring Vessels Engaged in Foreign Commerce"—as supporting their contention. We think it plain that these words do not import the meaning attributed to them by petitioners; and regardless of the precise meaning of the phrase, the title of the statute is not available to create an ambiguity where its substance is clear. *Fairport, P. & E. R. R.* v. *Meredith*, 292 U. S. 589, 594.

D. Petitioners argue (Pet. 71–89) that a criminal intent to perpetrate a wrong, in the form of malice against the owner of the vessel, is an es-

[14] Petitioners attempt to explain this history by asserting that Title II, and not Title III, was intended to deal with immobilized vessels, and that the statutory purpose was limited to the protection of navigable waters against scuttling. While it may be true that such was the primary purpose of Title II, that very fact serves to emphasize the applicability of Title III to immobilized ships when it is remembered that the only *sinking* of a German merchantman was that of the *Liebenfels* in Charleston, South Carolina. See *Wierse* v. *United States*, 252 Fed. 435, 440 (C. C. A. 4).

sential requirement of Title III. This contention is based upon the mistaken premise that the purpose of the statute is to protect property-ownership rather than the public interest in ships as instrumentalities of foreign commerce. The argument also is impliedly precluded by the statute, which prescribes a specific standard of intent: "to injure or endanger the safety of the vessel or of her cargo, or of persons on board". The court below was, therefore, clearly correct in holding (R. 103) that "no further showing of malice or intent to commit a wrong is required."

E. Petitioners interpret (Pet. 89–98) the statute as requiring an intent to injure the safety of the vessel or endanger the safety of the vessel, and they argue that an intent to injure the vessel, alone, is insufficient.[15] The Circuit Court of Appeals ruled against petitioners here (R. 103). The wording, context, and legislative history of the provision are inconclusive, yielding only contradictory clues as to its effect. Assuming, *arguendo*, that petitioners are right in the interpretation for which they contend, they have no basis on which

[15] Petitioners cite *United States* v. *Saglietto*, 41 F. Supp. 21 (E. D. Va.), and *United States* v. *Martini*, 42 F. Supp. 502 (S. D. Ala.) in support (Pet. 89–92). On this point the *Saglietto* case was expressly disapproved by the court below in its opinion in the instant cases (R. 104). And Judge McDuffie's holding in the *Martini* case has been disapproved by the Circuit Court of Appeals for the Fifth Circuit in *Marchese* v. *United States*, Appendix, *infra*, pp. 22, 24–28.

to complain of their convictions: in each case the trial court explicitly instructed the jury that the defendants could not be convicted unless the jury found that they intended to injure or endanger the vessel's safety (R. 54, 59, 60–61; Pieraccini R. 110, 115, 117–118; Schiaffino R. 115, 118); and in each case the evidence was plain that the safety of the vessel, even for the purpose of lying in the harbor, was in fact endangered (R. 30, 34–35; Pieraccini R. 11–19, 21, 31–32, 41–44, 47–48; Schiaffino R. 19, 21–22, 24–26, 48–49). It is difficult, in any event, to find substance in the distinction drawn by petitioners between the statutory construction adopted by the court below and that contended for by petitioners; it can scarcely be said that *any* tampering with the motive power or instrumentalities of navigation of a ship that is done with intent to injure the vessel does not endanger its safety.[16]

II

There is clearly no merit in petitioners' contention (Pet. 100) that the application of Title III to owners of vessels and their authorized agents is an unconstitutional invasion of property rights

[16] It is far from clear that, as petitioners have assumed, the safety of a vessel is to be considered solely from the viewpoint of idleness in port; on the contrary the character of Title III of the Espionage Act, as indicated by its background, would strongly tend to show that safety is to be estimated with reference to a ship's normal employment.

under the Fifth Amendment. The power of Congress pursuant to the grant contained in the commerce clause is plenary and as broad as the needs of commerce. See *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 426. Unquestionably this power extends to protection of the instrumentalities of foreign commerce against acts of trespassers or owners designed or calculated to interfere with such commerce. The statute does not take property, but rather is designed to protect and preserve it. While the statute limits the liberty of an owner to destroy or injure his property, this limitation bears a real and substantial relation to the legitimate regulatory object sought to be attained, and therefore satisfies the requirement of due process. Cf. *Nebbia* v. *New York*, 291 U. S. 502, 525.

Nor is there any merit in petitioners' contention (Pet. 100–101) that Title III, as applied to owners of vessels and their agents, is invalid because of the absence of standards by which to determine the limits marking off forbidden from permitted conduct. *Marchese* v. *United States*, Appendix, *infra*, pp. 22, 31. The statute clearly is not "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application", nor does it fail "to inform those who are subject to it what conduct on their part will render them liable to its penalties". *Connally* v. *General Construction Co.*, 269 U. S. 385,

391; cf. *Lanzetta* v. *New Jersey*, 306 U. S. 451. Title III, therefore, meets the requirement of certainty in due process of law.

CONCLUSION

The decisions below are clearly correct and the petitions for writs of certiorari present no question calling for review by this Court. It is therefore respectfully submitted that the petitions should be denied.

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APRIL 1942.

APPENDIX

Title II of the Act of June 15, 1917, c. 30, 40 Stat. 220, as amended by section 3 of the Act of March 28, 1940, c. 72, 54 Stat. 79 (U. S. C., title 50, secs. 191–194), provides as follows:

> SECTION 1. Whenever the President by proclamation or Executive order declares a national emergency to exist by reason of actual or threatened war, insurrection, or invasion, or disturbance or threatened disturbance of the international relations of the United States, the Secretary of the Treasury may make, subject to the approval of the President, rules and regulations governing the anchorage and movement of any vessel, foreign or domestic, in the territorial waters of the United States, may inspect such vessel at any time, place guards thereon, and, if necessary in his opinion in order to secure such vessels from damage or injury, or to prevent damage or injury to any harbor or waters of the United States, or to secure the observance of the rights and obligations of the United States, may take, by and with the consent of the President, for such purposes, full possession and control of such vessel and remove therefrom the officers and crew thereof and all other persons not specially authorized by him to go or remain on board thereof.
>
> Within the territory and waters of the Canal Zone the Governor of the Panama Canal, with the approval of the President,

shall exercise all the powers conferred by this section on the Secretary of the Treasury.

SEC. 2. If any owner, agent, master, officer, or person in charge, or any member of the crew of any such vessel fails to comply with any regulation or rule issued or order given by the Secretary of the Treasury or the Governor of the Panama Canal under the provisions of this title, or obstructs or interferes with the exercise of any power conferred by this title, the vessel, together with her tackle, apparel, furniture, and equipment, shall be subject to seizure and forfeiture to the United States in the same manner as merchandise is forfeited for violation of the customs revenue laws; and the person guilty of such failure, obstruction, or interference shall be punished by imprisonment for not more than ten years and may, in the discretion of the court, be fined not more than $10,000.

SEC. 3. It shall be unlawful for the owner or master or any other person in charge or command of any private vessel, foreign or domestic, or for any member of the crew or other person, within the territorial waters of the United States, willfully to cause or permit the destruction or injury of such vessel or knowingly to permit said vessel to be used as a place of resort for any person conspiring with another or preparing to commit any offense against the United States, or in violation of the treaties of the United States or of the obligations of the United States under the law of nations, or to defraud the United States, or knowingly to permit such vessels to be used in violation of the rights and obligations of the

United States under the law of nations; and in case such vessels shall be so used, with the knowledge of the owner or master or other person in charge or command thereof, the vessel, together with her tackle, apparel, furniture, and equipment, shall be subject to seizure and forfeiture to the United States in the same manner as merchandise is forfeited for violation of the customs revenue laws; and whoever violates this section shall be punished by imprisonment for not more than ten years and shall, in the discretion of the court, be fined not more than $10,000.

SEC. 4. The President may employ such part of the land or naval forces of the United States as he may deem necessary to carry out the purpose of this chapter.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 9935

NICOLA MARCHESE, ET AL., APPELLANTS,

v.

UNITED STATES OF AMERICA, APPELLEE.

No. 9936

VITTORIO SCHENONE, ET AL., APPELLANTS,

v.

UNITED STATES OF AMERICA, APPELLEE.

Appeals From the District Court of the United States for the Southern District of Florida

No. 9956

GINO FILLINI, RODOLFO FAVRETTO, CARLO SITTER, CARLO BOSSI, AND NICOLA DI SARIO, APPELLANTS,

v.

UNITED STATES OF AMERICA, APPELLEE.

Appeals From the District Court of the United States for the Southern District of Georgia

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No. 10010

ERNESTO RANISE, ET AL., APPELLANTS,

v.

UNITED STATES OF AMERICA, APPELLEE.

Appeal From the District Court of the United States for the Southern District of Texas.

No. 10025

ANTONIO BOZZO, ET AL., APPELLANTS,

v.

UNITED STATES OF AMERICA, APPELLEE.

No. 10026

MICHELE GENTILE, ET AL., APPELLANTS,

v.

UNITED STATES OF AMERICA, APPELLEE.

Appeals From the District Court of the United States for the Eastern District of Louisiana.

(March 9, 1942.)

Before SIBLEY, HUTCHESON, and MCCORD, Circuit Judges.

SIBLEY, *Circuit Judge:* These six appeals are similar in their facts, involve the same questions of

law, and have been argued together. In each case the officers and crew of a vessel of Italian registry which had been tied up in a port of the United States damaged her machinery and navigation equipment so as to render her incapable of use, but without harming her hull or rendering it dangerous for them to remain aboard her. This was done during the last days of March, 1941, by direction of the naval attaché of the Italian embassy at Washington, after war broke out between Italy and France, and for the purpose of so disabling the ships as to render them useless to an enemy of Italy. The owners, in most cases, had directed the ships' officers in case of war to obey instructions from the naval attaché. The officers and crew members were indicted for conspiracy to violate, and for violating, Title III of the Act of June 15, 1917, 40 Stats. 217, which appears as Section 502 of Title 18 of the United States Code. There were acquittals of conspiracy in some cases, but convictions of the substantive offenses charged in every case. It is denied that the acts charged were done, but the defense is that the statute does not apply to them, or if it does there was not the intent defined by the statute, and that the shipowners directed what was done. These contentions arose on demurrers to the indictments, motions for directed acquittals, and on requests for and objections to charges to the jury.

The history and meaning of the Act of June 15, 1917, have been ably discussed in similar cases by Judge Parker in *Bersia, et al,* v. *United States,* — Fed. (2) —; by Judge Paul in *United States* v. *Saglietto,* 41 F. Sup. 21; by Judge Goodrich in

United States v. *Tomicich,* 41 F. Sup. 33; by Judge Chesnut in *United States* v. *Pierraccini,* — F. Sup. —; and by Judge McDuffie in *United States v. Martini,* — F. Sup. —; with contradictory conclusions. We deem it expedient to set forth our views without particular comparison with those therein expressed.

We think Title II and Title III of the Act are independent. As Judge McDuffie points out, they arose as separate bills in the Senate. Section 3 of Title II [1] penalizes the wilful causing or permitting by an owner, master or member of a crew of a vessel, foreign or domestic, of the injury or destruction of the vessel, or permitting its use for named purposes; but the preceding and following sections show that Title II is applicable only after a proclamation of national emergency, and no such proclamation is alleged or had in fact been made in March, 1941. Section 4 declares that the President may employ the land and naval forces to carry out the purpose of the Title, indicating that emergency pervades the whole Title. Therefore the whole of Title II was properly placed in Title 50 of the United States Code, along with our other war legislation, rather than in Title 18, where ordinary crimes are treated.

Title III of the Act (18 U. S. C. A. § 502) is applicable in peace time as an ordinary criminal statute. Its meaning ought justly to be gathered from its words as promulgated to the public rather than from the expressions of legislators or even of their committees pending its passage. And a real doubt as to the meaning of the law ought to

[1] 50 U. S. C. A. § 193.

be given in favor of the accused, just as a real doubt as to his acts or intent ought to be. Title III consists of a single long sentence, quoted in the margin;[2] which can be simplified for present purposes by reducing it to the words here applicable: "Whoever shall set fire to any vessel of foreign registry * * * or shall tamper with the motive power or instrumentalities of navigation of such vessel, or shall place bombs or explosives in or upon such vessel, or shall do any other act to or upon such vessel while within the jurisdiction of the United States * * * with intent to injure or endanger the safety of the vessel or of her cargo, or of persons on board * * *; or whoever shall attempt or conspire to do any such acts

[2] TITLE III. INJURING VESSELS ENGAGED IN FOREIGN COMMERCE.

"SECTION 1. Whoever shall set fire to any vessel of foreign registry, or any vessel of American registry entitled to engage in commerce with foreign nations, or to any vessel of the United States as defined in section three hundred and ten of the Act of March fourth, nineteen hundred and nine, entitled 'An Act to codify, revise, and amend the penal laws of the United States,' or to the cargo of the same, or shall tamper with the motive power or instrumentalities of navigation of such vessel, or shall place bombs or explosives in or upon such vessel, or shall do any other act to or upon such vessel while within the jurisdiction of the United States, or, if such vessel is of American registry, while she is on the high sea, with intent to injure or endanger the safety of the vessel or of her cargo, or of persons on board, whether the injury or danger is so intended to take place within the jurisdiction of the United States, or after the vessel shall have departed therefrom; or whoever shall attempt or conspire to do any such acts with such intent, shall be fined not more than $10,000 or imprisoned not more than twenty years, or both."

with such intent, shall be fined, etc."[3] All the acts named, whether done or attempted or conspired about, must be with "intent to injure or endanger the safety of the vessel, or of her cargo, or of persons on board." There is in this specification of intent plainly an ellipsis, words left out, to be supplied from the context. The word "injure" is a transitive verb, requiring an object, but none immediately follows it. Is its object to be taken to be the noun "safety" in the phrase "endanger the safety", or are the nouns "vessel", "cargo" and "persons" the objects meant? "Endanger the safety" is a common expression to signify jeopardy without actual injury inflicted. "Injure the safety" is a most unusual expression, injury being commonly affirmed as done to a person or a concrete thing. We think the natural meaning fully expressed is this: "With intent to injure the vessel, her cargo, or persons on board, or to endanger the safety of the vessel, or of her cargo, or of persons on board." If in interpreting a criminal statute we may regard its legislative evolution, we will find confirmation of this interpretation. Title III originated as a separate bill, Senate Bill No. 6793, and was entitled: "A bill to prevent and punish wilful injury, or attempted injury to, or conspiracy to injure, any

[3] The maximum imprisonment is twenty years, much higher than that fixed in Title II. Only the ship is involved in Title II. Human life may be involved under Title III, justifying a higher maximum. The sentences imposed in the cases under review range from a few months' imprisonment to four years, the ships only having been injured, or intended to be injured.

vessel engaged in foreign commerce, or the cargo or persons on board thereof, by fire, explosion, or otherwise." The main purpose was to deal with actual injury to the vessel, its cargo, or persons on her. The phrase "or endanger the safety of" seems to have been inserted later to cover cases where no specific injury was done or intended, but only a dangerous condition created. It was added not to restrict but to broaden the application of the Act; and actual injury to the vessel, cargo, or persons on her was not thereby put out of the scope of the Act.

That the owners of these ships through the naval attaché consented to the acts of injury is not a defense. It is true as argued that common law offenses against private property such as burglary, larceny, arson, and malicious mischief, did not apply to an owner dealing with his own property; and that many statutes made to protect private property have similarly been held not to apply to the owners.[4] But a legislature can prevent destruction of private property by its owner, or its injury, when the public interests are concerned. Thus fish and game can be protected against unreasonable killing on one's own land, though he has a right to take them appurtenant to his land; and conservation statutes may protect forests, oil and coal deposits, and other things

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[4] Appellants cite: *United States* v. *Cardish*, 145 Fed. 242; *Rex.* v. *Spaulding*, 1 Leach 218; *Rex* v. *Breeme*, 1. Leach, 220; *State* v. *Mason*, 1 Ire. (N. C.) 341; *State* v. *Jones*, 120 N. C. 508; *Martin* v. *Regina*, 3 N. & P. 492; *Rex* v. *Madox*, Russ. & Ry., 92; *Commonwealth* v. *Hartnett*, 69 Mass. 450; *United States* v. *Vanranst*, 28 Fed. Cas. 360; *United States* v. *Murphy*, 50 Fed. (2) 455.

important to the public welfare, against improvident or wasteful consumption by their owners. Statutes can be made whereby any private property can be taken for public use, just compensation being paid, and the needed property can be protected until it is taken. The statute before us was not made to protect shipowners against the acts of others, but to protect the public interest in ships as vehicles of foreign commerce, with their cargoes and persons on board, against injury or danger by the acts of any person, whether owner, crew, or outsider. It would be absurd to say that an owner may do some of the things prohibited, such as placing a bomb on the vessel, or setting a fire, with intent to injury either persons on board, or the cargo. Congress has under the Constitution full authority to protect and foster foreign commerce, and this includes protection of its instrumentalities, most important among which are vessels. The title of the whole Act states as one of its purposes "To punish acts of interference with * * * the foreign commerce of the United States." Title III is headed "Injuring vessels engaged in foreign commerce." The interests of foreign commerce, and not of the owners of ships, are here the object of congressional solicitude. Cargo and passengers on board are commerce. Vessels are instruments of commerce. All are protected by the statute against the acts of everyone. The word "Whoever," with which the Title opens, is the most comprehensive designation of persons in our language.

It is thereupon argued that only ships which at the time of injury are actively engaged in com-

merce are meant by the Act, and not those tied up at the wharf indefinitely, as these were. While the title of the Act speaks of foreign commerce, and the heading of Title III speaks of "Vessels engaged in foreign commerce," the effective language of the body of this Title is, "Vessels of foreign registry" and "Vessels of American registry entitled to engage in commerce with foreign nations." There is no uncertainty or ambiguity about these expressions in the body of the Act, and the language of the title or heading does not limit them. Vessels of foreign registry in American ports and vessels of American registry entitled to engage in foreign commerce, though not at the moment active in such commerce, are available for such use. The United States may even take them over to compel their use. Congress may protect them. The vessels here involved were tied up only for an emergency which it was hoped would pass away. The ships had not by their owners been devoted to another use.

Thus construing the statute, we think the indictment in *Ranise, et al,* v. *United States,* from Texas, which alleged acts done with intent to injure the vessel, saying nothing about endangering her safety, was sufficient, and the charge of the court accordingly was correct. In the other indictments the full language of the statute as to intent was used, and was of course abundantly sufficient. The varying charges to the jury, if error, were error in favor of the defendants. In each case the acts charged were admitted to have been done, and with intent to render the vessel incapable of use in commerce. This was an injury to her as a vessel. It

may be regrettable that absent owners who authorized the acts, and immune diplomatic persons who ordered them, are not the subjects of punishment, but only ship officers and crews who were doing what they were told to do, and probably thinking they were doing right. It does not, however, appear that anyone acted under such duress as to render him irresponsible to the criminal laws. All must, while they are in an American port, obey the laws of the United States made to regulate foreign commerce.

Finally, an attack is made upon the Act as in violation of the Fifth Amendment, because depriving the owners of their property without due process of law, and because no sufficiently clear standard of criminality is set forth. The Act is a reasonable preservation of property. It does not take it. It does limit an owner's right to injure or destroy his property, but since the limitation is made in the public interest there is no such arbitrariness as to constitute a want of due process. There is no failure, as respects appellants, in defining what they might not do. The Act prohibits "tampering with the motive power or instrumentalities of navigation of a vessel" with intent to injure her or endanger her safety. They did exactly that in each case. The law is plain enough.

The judgment in each case is

AFFIRMED.

A True copy.
Teste.

_____ _____,

Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

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(19)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1009.

ADRIANO MERLANO BERSIA ET AL.,
Petitioners,
against
UNITED STATES OF AMERICA,
Respondent.

No. 1010.

PAOLO PIERACCINI ET AL.,
Petitioners,
against
UNITED STATES OF AMERICA,
Respondent.

No. 1011.

LUIGI SCHIAFFINO ET AL.,
Petitioners,
against
UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF FOR PETITIONERS.

HOMER L. LOOMIS,
Counsel for All Petitioners.
CHARLES RUZICKA,
Associate Counsel for Petitioners in Nos. 1010–1011.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1009.

ADRIANO MERLANO BERSIA ET AL.,
Petitioners,

against

UNITED STATES OF AMERICA,
Respondent.

No. 1010.

PAOLO PIERACCINI ET AL.,
Petitioners,

against

UNITED STATES OF AMERICA,
Respondent.

No. 1011.

LUIGI SCHIAFFINO ET AL.,
Petitioners,

against

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF FOR PETITIONERS.

There are in respondent's brief but three matters that call for reply.

I.

The Purpose of Titles II and III, Respectively, of the Act of June 15, 1917, as Evidenced by Their Historical Setting.

The first of these matters is the contention that Title III of the Act of June 15, 1917, c. 30, 40 Stat. 221, (18 U. S.

C. A., sec. 502), (Petitioners' brief, 13-14, footnote), was specially enacted to cover just such cases as these; which argument is predicated upon the theory that it was the destruction, by their German crews, of the engine machinery on the German ships tied up in American ports, in February, 1917, that was responsible for the measure.

A review of the legislative background disproves the assertion. That shows it was Title II that stemmed from the German engine damage; *not* Title III.

What eventually developed into Titles II and III were introduced as separate bills, *viz.* S. B. 6795 and S. B. 6793, away back on August 5, 1916, by Senator Culberson of Texas, not only long before any damage had been done to the machinery of the German ships, but presumably long before anyone had anticipated that such damage might possibly be done. As to the time and circumstances under which that damage was done, see the vivid account prepared by the United States Department of Justice as, in part, reproduced in the appendix, attached hereto, marked A, and made a part hereof.

Except for enlarging the class of vessels affected by it, S. B. 6793 passed through the stirring events of February, 1917, without change, and became Title III precisely in the form and language in which it was originally introduced at a time more than ten months before.*

* A Chinese, or exact, copy of the bill (S. B. 6793), as originally introduced, follows:

"64th Congress, 1st Session. S. 6793

In the Senate of the United States.

August 5, 1916.

Mr. Culberson introduced the following bill; which was read twice and referred to the Committee on the Judiciary.

A BILL

To prevent and punish willful injury or attempted injury to, or conspiracy to injure any vessel, engaged in foreign commerce,

But S. B. 6795, on the other hand, underwent a complete metamorphosis right after, and obviously as a result of, the Germans' damaging their ships' engines on or about February 1, 1917. It was entirely rewritten.

As originally introduced, it aimed merely at the prevention of the use of ships, laid up in our harbors, as dens for the hatching of plots against the United States and foreign nations; it contained no provision for a presidential proclamation of a national emergency, nor for the Secretary of the Treasury's assuming control over, taking possession of, or removing the officers and crews from, such ships; and, more important still, *it was wholly devoid of any suggestion*

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or the cargo or persons on board thereof, by fire, explosives, or otherwise.

1. *Be it enacted by the Senate and House of Repre-*
2. *sentatives of the United States of America in Congress Assembled,*
3. That whoever shall set fire to any vessel engaged in com-
4. merce with foreign nations, or her cargo, or shall tamper
5. with the motive power or instrumentalities of navigation of
6. such vessel, or shall place bombs or explosives in or upon
7. such vessel, or shall do any other act to or upon such
8. vessel while within the jurisdiction of the United States,
9. or, if such vessel is of American registry, while she is on the
10. high sea, with intent to injure or endanger the safety of the
11. vessel or of her cargo, or of persons on board, whether the
12. injury or danger is so intended to take place within the

1. jurisdiction of the United States, or after the vessel shall
2. have departed therefrom; or whoever shall attempt or con-
3. spire to do any such acts with such intent, shall be fined not
4. more than ten thousand dollars, and imprisoned not more
5. than ten years."

*that it should be unlawful for the owners, officers and crews of such vessels to injure or destroy them.**

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* A Chinese copy of the Bill (S. R. 6795), as originally introduced, follows:

"64th Congress, 1st Session. S. 6795

In the Senate of the United States.

August 5, 1916.

Mr. Culberson introduced the following bill; which was read twice and referred to the Committee on the Judiciary.

A BILL

To authorize the collector of customs, or other officers duly empowered by the President, during time of war between foreign nations, to inspect private vessels within the jurisdiction of the United States for the purpose of detecting any use or attempted use of such vessel in violation of the law of nations or of the treaties or statute law of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be lawful for the collector of customs, or other officers duly empowered by the President, at any time during war between foreign nations, or between factions within a foreign country, to inspect any private vessel within the jurisdiction of the United States for the purpose of detecting any use or attempted use of such vessel in violation of the statutes or treaties of the United States, or of the obligations of the United States under the law of nations.

2

Sec. 2. That it shall be unlawful for the owner or master, or other person in charge or command of any private vessel, within the jurisdiction of the United States, knowingly to permit said vessel to be used as a place of resort for any persons conspiring or preparing the means to commit any offense against the United States, or in violation of the treaties of the United States or of the obligations of the United States under the law of nations, or to defraud the United States, or knowingly to permit such vessel to be used in violation of the obligations of the United States under the law of nations; and in case such vessel shall be so used, with the knowledge of the owner or master, or other person in

But when this same bill (S. B. 6795) was reported out of the Senate Judiciary Committee on February 8, 1917, the damage to the engine machinery of the German ships having just been perpetrated by their crews, its character was wholly transformed into virtually that which, as Title II, it bears today (Vol. 54 Cong. Rec., Pt. 3, p. 2819).

And, quite as significantly, it was hailed in the public press of that time as having been "designed expressly to prevent the destruction or damaging by their crews of German ships lying in American ports". See Appendix A, attached hereto, *infra*, pp. 15-16.

In view of this legislative back-ground, there could seem to be no real doubt that it was Title II, not Title III, that was intended, as Judge Parker said, "to forbid and punish just such conduct" (*Bersia* v. *United States*, 124 F. (2d) 310, 313).

The obvious purpose of Title III on the other hand was to meet the need, — revealed in the case of *Daeche* v. *United States*, (C. C. A. 2d Cir.), 250 Fed. 566, tried in May, 1916, (*id.* 567), just two months before S. B. 6793 was introduced, — of a federal law preventing the destruction or injury of ships by trespassers for no purpose other than to imperil such ships, their cargoes and the persons aboard them. A glance at that case will show that it was only by the most refined of reasoning that the conviction of Daeche was finally upheld under the only statute then available, *viz.*, an old law designed against thieves and despoilers.

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13. charge or command thereof, the vessel, together with her
14. tackle, apparel, furniture and equipment, shall be forfeited
15. to the United States; and the owner, master, or person in
16. charge or command thereof, shall be fined not more than
17. ..... dollars, or imprisoned not more than .....
18. years, or both.
19. Sec. 3. That the President of the United States is
20. authorized and empowered to employ such part of the land
21. or naval forces of the United States as shall be necessary to
22. carry out the purposes of this Act."

The erroneous assumption in the Government's brief, that Title III had the "special purpose" of meeting the need for legislation disclosed by the German crews' damaging their own ships' machinery, not only underlies and vitiates respondent's argument as to the class of persons aimed at in Title III, contrary to all common-law principles of statutory construction, (Respondent's Brief, 9-12), but also misleads Government counsel into attributing to the language of Title III ("tamper") a distorted meaning designed to fit the erroneously assumed "special purpose" of the legislation (Respondent's Brief, p. 12, foot-note).

The same error misleads them into giving to Title III a construction that would make it applicable to all ships, even though not engaged in foreign or interstate commerce or commerce relating to and essentially affecting the same (*id.* 15), and, therefore, into giving it an effect that, as pointed out *infra* (7-10), must render Title III unconstitutional and void.

The same erroneous assumption, *viz.*, that Title III was born of the German ship damage, with a "special purpose" to cover such cases, likewise betrays respondent's counsel into the false position that Congress must have intended the severe penalties imposed by Title III to be leviable upon persons acting without any criminal intent whatever (Respondent's Brief, 16); and, at the same time, has induced those counsel to construe the specific intent, plainly defined to the contrary in Title III, as inclusive of an intent not only to imperil the safety of ship, cargo and persons aboard her, but also of one merely to wreak some injury upon her or her equipment (*id.* 16).

It is thus readily apparent how completely the initial error of attributing, to Title III, the legislative genesis peculiarly applicable to Title II, has pervaded and rendered fallacious the entire argument here advanced on the respondent's behalf.

II.

The Attempt to Give Title III an Application to Ships Not Engaged in Foreign Commerce.

The second matter in respondent's brief, that calls for a reply is the contention that the ships embraced in Title III are not, by fair implication, confined to those engaged in foreign commerce.

Petitioners' reply to that argument is that it would necessarily condemn Title III as unconstitutional and void.

Title III literally includes, as vessels subject to its terms, all vessels "of the United States as defined in section three hundred and ten of the Act of March fourth, nineteen hundred and nine, entitled 'An Act to codify, revise, and amend the penal laws of the United States'."

Such vessels include every boat, big or little, whether propelled by steam, by sail, by mule, or by hand, wherever kept and operated in the United States, not only in or upon what are known as navigable waters, but also in and upon every little river, canal, creek, or lake, lying wholly within the respective borders of the different States of the Union.

Such vessels include every tugboat, barge, lighter, canal boat, yacht, motor launch, rowboat, skiff and canoe within the territorial United States.

The only qualification required to bring all such vessels within the ambit of Title III, if a literal interpretation is to be given thereto, is that they belong in whole or in part to a citizen of the United States. For section 310 of the Act of March 4, 1909, c. 321, 35 Stat. 1148, reads as follows:

> "The words 'vessel of the United States,' wherever they occur in this chapter, shall be construed to mean a vessel belonging in whole or in part to the United States, or any citizen thereof, or any corporation created by or under the laws of the United States, or of any State, Territory, or District thereof."

Petitioners believe that it would be unreasonable to attribute to Congress an intention to legislate for the welfare and safety of all such vessels; and that, if Congress did so intend, it wanted the constitutional power so to legislate.

That Congress lacked the constitutional power to legislate with respect to all such vessels, unless engaged in commerce with foreign nations or between the states or territories of the Union, would seem clear.

> "It is not intended to say, that these words" (the constitutional grant to Congress of the power to regulate commerce with foreign nations, etc.) "comprehend that commerce, which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary."
>
> *Gibbons* v. *Ogden*, 9 Wheat. 1, 194.

> "The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself."
>
> *Id.* 195.

It was, as this Court will recall, because the first Federal Employers' Liability Statute (Act of June 11, 1906, 34 Stat. 232) applied indiscriminately to commerce, intrastate, as well as interstate, that it was held unconstitutional (Employers' Liability Cases, 207 U. S. 463); even though it applied only to such commerce when it was transacted by interstate carriers.

Title III is not an emergency statute. But, even had it been such, it could not have enlarged the constitutional power of Congress to deal with matters over which Congress had been given no regulative power (*Schecter Corp.* v. *United States,* 295 U. S. 495, 528-529).

It seems clear, therefore, that Title III, in order to be constitutional, must be held to be qualified and limited not only by the heading of Title III, but by the title of the chapter, both of which point to vessels engaged in foreign commerce. Such a construction gives ample room for the operation of the statute with respect to vessels belonging to citizens of the United States and not registered. The statute would thus apply to all tugboats, lighters, barges, and other craft plying in and about the various ports of the United States, while engaged in feeding foreign commerce in such ports to the larger steamers that thereafter take it across the seas, or while engaged in helping to deliver and distribute to inland carriers the foreign commerce brought into those ports from abroad, and there discharged from such larger steamers. These smaller craft, while so engaged, are quite as much engaged in foreign commerce as could be any steamers of foreign or American registry.

Since, then, Title III must be unconstitutional if it be held to apply literally to the vessels described therein, and becomes at once both constitutional and reasonable if its application be confined to vessels engaged in foreign commerce, the former construction should be avoided and resort be had to the latter.

> "The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same. *Federal Trade Comm'n* v. *American*

Tobacco Co., 264 U. S. 298, 307; *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 390; *Missouri Pacific R. Co.* v. *Boone*, 270 U. S. 466, 472; *Blodgett* v. *Holden*, 275 U. S. 142, 148; *Richmond Screw Anchor Co.* v. *United States*, 275 U. S. 331, 346."

Labor Board v. *Jones & Laughlin*, 301 U. S. 30.

III.

Judge Sibley's Opinion.

The third matter, in respondents' brief, calling for a reply, is its reference to the opinion of the Circuit Court of Appeals in *Marchese* v. *United States* and five companion cases involving facts substantially identical, save in formal features, with those constituting the cases at bar; which opinion was delivered on March 9, 1942, and, therefore, at a time too late to permit a reference thereto in petitioners' brief.

A timely application for a rehearing is pending undecided in those cases.

There are four positions assumed in the opinion of that court, written by Judge Sibley, that, we feel, call for consideration at this time.

First, the court attempts to reconcile section 3 of Title II and Title III by holding the former to have been inoperative, at the time of the events here in question, for want of a proper presidential proclamation. Petitioners believe the effort vain; and that it is immaterial whether section 3 of Title II was or was not meant to be effective only in times of unlimited national emergency. For Congress did therein deal specially with the case of damage done to ships by their owners, officers and crews and other persons, acting in conjunction therewith, in American ports. If Congress meant such acts, as interdicted in that section, to be punishable only in times of emergency, then it must follow that Congress did not mean them to be pun-

ished at other times under the general terms of some other statute.

Secondly, Judge Sibley says (Respondents' Brief, 29): "It would be absurd to say that an owner may do some of the things prohibited, such as placing a bomb on the vessel, or setting a fire, with intent to injure either persons on board, or the cargo."

Petitioners believe that, in so holding, the learned Judge overlooked the fact that he was pronouncing absurd the common-law rule governing the construction of statutes relating to the destruction of property; that that rule, like all others of the common law, was founded upon reason; that at least one reason justifying such rule was that self-interest is ordinarily a sufficient deterrent to prevent men from destroying their own property; and that, if it be absurd to say that an owner *may* set fire to his vessel with intent to injure persons or cargo or both, it would be no less absurd to suppose that he *would* do so, and to provide by general legislation against such an event.

Thirdly, Judge Sibley, in construing Title III as applicable to the owner of the chattels referred to therein, points to the *power* of a legislature to prevent an owner's destruction of his own property, when public interests are concerned, and cites, as instances, fish and game statutes, conservation statutes and laws relating to coal and oil deposits. (Respondents' Brief, p. 27.)

Petitioners believe that, in so ruling, Judge Sibley overlooked the fact that fish and game are not chattels, but that title thereto, while the same remain within a given state, is in the sovereign thereof, as trustee for the people as a whole, (*Geer* v. *Connecticut*, 161 U. S. 519; *Lacoste* v. *Dept. of Conservation*, 263 U. S. 545, 549; *Bayside Fish Co.* v. *Gentry*, 297 U. S. 422, 426); that the conservation statutes

referred to by the court relate to public, not private, forests (*Shiver* v. *United States*, 159 U. S. 491; *United States* v. *Paine Lumber Co.*, 206 U. S. 467); and that oil deposits are natural products not wholly beneath the soil of any one land-owner and incapable of being captured without at the same time affecting adjacent or neighboring land-owners. And, as to coal deposits, petitioners know of no instances of an owner's having been restricted in his output.

But, apart from all that, the question here, save in its Constitutional aspects as more particularly argued elsewhere, is not so much one of power, as it is of the imputation to a legislature of the exercise of such power from the merely general words of a statute and contrary to all accepted rules of statutory construction.

Fourthly, Judge Sibley is clearly in error in holding (Respondents' Brief, p. 27) that the phrase, "endanger the safety of", was an after-thought or later addition inserted in the bill that finally became Title III and not originally included in the draft thereof as first introduced. We have shown *supra* (2-3, foot-note) that bill (S. B. 6793) exactly as it read when first introduced on August 5, 1916. It then contained the phrase in question and kept it unaltered thereafter at all times through its emergence into law.

Conclusion.

The Writs of Certiorari prayed for should be granted to the end that this Court may review and reverse the judgments entered below.

Respectfully submitted,

HOMER L. LOOMIS,
Counsel for All Petitioners.

CHARLES RUZICKA,
Associate Counsel for Petitioners in Nos. 1010–1011.

Appendix A.

In the brief filed on March 4th, 1942, on behalf of the United States, in the Circuit Court of Appeals for the Third Circuit, in cases substantially identical, save in their formal features, with those at bar, viz., *United States* v. *Scaleggeri,* and five companion cases, there was appended as Appendix A a statement entitled "Historical setting for the Enactment of Title II of the Act of June 15, 1917, (40 Stat. 220, 50 U. S. C., secs. 191-193)."

The statement was described (p. 26) as having been

> "prepared at the direction of Francis M. Shea, Esquire, Assistant Attorney General, by Harold B. Finn, Esquire, Special Assistant to the Attorney General, for use in connection with the prosecution of certain libel proceedings pending in the District of New Jersey against the Italian vessels involved in criminal acts."

We reproduce here the pertinent part of that statement as to the time when, and circumstances under which, the engine machinery of the German ships tied up in our harbors in February, 1917, was damaged by their own crews (pp. 17-18):

"What is now history was fresh in the minds of the Congress that passed the legislation in the Spring of 1917. The facts were vividly brought to public attention by the daily press. Typical are the graphic accounts in the New York Times of the destruction of these vessels and of the helplessness of the Government to prevent it.

The issue of February 1st, 1917, carried news of the German declaration of unrestricted submarine warfare in the waters surrounding the British Isles and also a report that the crews of the interned vessels would attempt to scuttle the vessels or to destroy their machinery in the event of war. (New York Times, Feb. 1, 1917, p. 1, col. 1.)

The next day it was reported that guards had been placed around the vessels at New York, Jacksonville, San Francisco, New London, Baltimore, Philadelphia and Savannah. (New York Times, Feb. 2, 1917, p. 4, cols. 1, 4, 5.) The same

issue reported that two hours before the German note announcing unrestricted submarine warfare began arriving in this country, the commanding officers of the thirty vessels in New York Harbor were said to have received instructions to destroy their ship's papers and to remove various parts of the machinery so as to render the ships useless in the event of a German American break. (New York Times, Feb. 2, 1917, p. 4, col. 1.)

The next week's papers reported the wrecking of the engines of vessels at Boston, the Philippines and Hawaii. (New York Times, Feb. 5, 1917, p. 4, col. 2, 3; N. Y. Times, Feb. 7, 1917, p. 1, col. 2; New York Times, Feb. 7, 1917, p. 5, col. 5.)

The Times reported that Collector Malone of the Port of New York had requested permission from the various German Steamship companies to go below decks and had been refused, and thereafter decided not to press the matter. (New York Times, Feb. 7, 1917, p. 5, col. 5.)

The next day The Times reported that government men who had been excluded from the engine room of the vessel at New York had managed to slip past the ship's officers and had confirmed the damage to the vessel's machinery. (New York Times, Feb. 8, 1917, p. 2 col. 4.)''

To the foregoing statement of the United States Department of Justice, we may, by way of supplementing the same, add the following observations:

The sequence between the damage and the legislation is significant. The New York Times of February 7, carried a dispatch dated Washington, February sixth, reading in part as follows:

> ''Every one of the seventeen war-bound German ships examined by American officials at Philippine ports since the break with Germany has been damaged by her crew so badly that six months or more would be required to make any of these seaworthy. An official report today said that of the twenty-three vessels tied up in the islands all but six had been inspected, and none had been found which could be put into condition without a large expenditure of time and money.''
>
> New York Times of Feb. 7, 1917, pp. 1, 5.

And on the following day but one, February 9, the New York Times carried the news, to a waiting nation, of the Judiciary Committee's reporting out "a bill designed expressly to prevent the destruction or damaging by their crews of German ships lying in American ports." And, the Bill so referred to was not what is now Title III, but, instead, what is now Title II (S. B. 6795).

The dispatch dated "Washington, Feb. 8," read as follows:

> "The Senate Judiciary Committee today reported out a bill designed expressly to prevent the destruction or damaging by their crews of German ships lying in American ports. The bill was approved today with thirteen others on which the Committee has been working under extra pressure for the last five days. All of them relate to the preservation of neutrality and the protection of American interests and property during war time. The Senate is expected to rush action on them.
>
> "The bill to prevent the damaging of shipping gives comprehensive power to the Treasury Department to inspect, guard and even take full possession of vessels in American ports in times of Secretary deems it advisable (*sic*). The measure makes it a felony for the crews to injure them. It also has a provision to bar conspiracies on board the vessels.
>
> The bill provides that whenever the President shall declare a national emergency to exist by reason of actual or threatened war, insurrection, or invasion, or disturbance of the international relations of the United States, 'the Secretary of the Treasury may make rules governing the anchorage and movement of all foreign and domestic vessels in the territorial waters of the United States.'
>
> "The Secretary is 'empowered' to 'inspect such vessels at any time, to place guards on such vessels, and, if necessary in his opinion, in order to secure such vessels from damage or injury or to secure the observance of the obligations of the United States under the law of nations, or to maintain the national defense, he is

further authorized and empowered to take full possession and control of such vessels and to remove therefrom the officers and crew thereof and all of the persons not authorized by him to go or remain on board such vessels.'

"Section 2 provides that it shall be the duty of the 'owners, agents, masters, persons in charge, officers, and members of the crew,' to comply with the orders of this Government. Failure to comply or obstruction or interference will mean that the vessel will be subject to seizure and that the persons involved will be fined $10,000 or imprisoned two years.

"Section 3 provides that it shall be unlawful for the owners, master, or person in charge of any vessel 'to willfully cause or permit the destruction or injury of such vessel or knowingly to permit said vessel to be used as a place or resort for any person conspiring with another or preparing to commit any offense against the United States,' or in violation of the treaties or obligations of this country. Violation of this section involves the same penalty as that in Section 2.

"Among the other bills reported today was the espionage measure introduced by Senator Overman on Tuesday, which provides heavy penalties for furnishing information to foreign Governments in times of both peace and war. These measures were all drawn in co-operation with the officials of the Department of Justice."

New York Times of Feb. 9, 1917, p. 5.

The same issue of the Times carried a report of an appeal by Archibald R. Watson, of the New York bar, for the prosecution of the German officers and crews, for the damage done to their ships' machinery, under the State laws of New York and New Jersey; and a report of an interview had with Martin W. Littleton, of the same bar, pointing out that such laws did not apply when the damage was done with the consent of the owners.

Watson cited Section 1425 (par. 15) of the New York Penal Code (cited in Petitioners' Brief, pp. 39-40) and the

Public Laws of New Jersey, 1898, p. 834, as warranting the prosecution he urged. But, the Times continued,

> "Martin W. Littleton said yesterday that if it developed that any injury done to the German ships had been done with the consent of the owners the section of the Penal Code cited by Mr. Watson would not apply. Punishment could only be imposed, he pointed out, if it were discovered that 'malicious michief' was done by persons without the consent of the owners.
>
> "This view of the case was understood by Mr. Watson, but he contends that only an investigation by the authorities will show who is responsible."

New York Times of Feb. 9, 1917, p. 5.